(3)

No. 06-1408

IN THE

Supreme Court of the United States

BAHIG BISHAY,

Petitioner,

v.

CITIZENS BANK OF MASSACHUSETTS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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REPLY TO RESPONDENT'S OPPOSITION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF FOR THE PETITIONER	1
CONCLUSION	9
APPENDIX A	1a
APPENDIX B	7a
APPENDIX C	8a
APPENDIX D	11a
APPENDIX E	12a
APPENDIX F	13a
APPENDIX G	14a
APPENDIX H	15a

TABLE OF AUTHORITIES

CASES — Page

In re Auto Specialties Manufacturing Co., 18 F.3d 358, 361 (6th Cir. 1994) 1-2

Duryea v. Third Northwestern National Bank of Minneapolis, 606 F.2d 823, 826 (8th Cir. 1979) 2

Apollo Travel Inc., 567 F.2d 841, 842 (8th Cir. 1977) 2

Dick Warner Cargo *Handling Corp. v. Aetna Business Credit inc.*, 746 F.2d 126 (2nd Cir. 1984) 2

In re 1095 Commonwealth Avenue Corp. and Bahig F. Bishay, Nos. 95-15015 and 96-16331 (Bank. Mass) 2

STATUTES

Mass. Gen. L. ch. 106, § 9-404 (1997) 1

N.Y. UCC § 9-404 (McKinney 1997) 1

Mass. Gen. L. ch. 183, § 55 1

N.Y. Real Prop. Acts. Law § 1921 (McKinney 1997) 1

11 U.S.C. 1123(b)(3) 8

Massachusetts General Laws Chapter 93A 7

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The brief in opposition offers no justifiable reason to deny certiorari. Most of it is consumed by respondent's self-serving twist on the facts that not only has nothing to do with whether review is warranted, is furthermore inaccurate and otherwise unsupported by the record, and introduces hyper-technical, red-herrings that have nothing to do with the serious issues presented in the pending petition.

1. The petition for certiorari demonstrated that the Respondent, Citizen Bank of Massachusetts ("Citizens"), reported the actual conflict among the circuits, the various statutes and the state supreme courts—all in the following order: Mass. Gen. L. ch. 106, § 9-404 (1997); N.Y. UCC § 9-404 (McKinney 1997); Mass. Gen. L. ch. 183, § 55; N.Y. Real Prop. Acts. Law § 1921 (McKinney 1997); *In re Auto*

Specialties Manufacturing Co., 18 F.3d 358, 361 (6th Cir. 1994); *Duryea v. Third Northwestern National Bank of Minneapolis*, 606 F.2d 823, 826 (8th Cir.1979); *Apollo Travel Inc.*, 567 F.2d 841, 842 (8th Cir. 1977); and *Dick Warner* Cargo *Handling Corp. v. Aetna Business Credit inc.*, 746 F.2d 126 (2nd Cir. 1984). [Pet. App. at 11a-12a]

2. Petitioner Bahig F. Bishay ("Bishay"), merely brought this reported conflict to the attention of this Court, as the ultimate authority, in accordance with Rule 10[1]. The *public policy* question now at bar, which has become the law of the case *In the Matter of 1095 Commonwealth Avenue Corp. and Bahig F. Bishay*, Nos. 95-15015 and 96-16331 (Bankr. Mass.; hearing of 4/23 and 4/27/96). [Pet. App. 11a-14a], is *Whether a Secured Lender *** May Refuse to Release Its Liens *** Even After Repayment*?

Here is what the respondent reported as a result of the entrenched split between the various authorities listed above:

> *"This issue recently arose in an unreported case in the U.S. Bankruptcy Court for the District of Massachusetts. In the matter of 1095 Commonwealth Avenue Corp. and Bahig F. Bishay, Nos. 95-15015 and 95-16331 (Bank. Mass.; hearing of 4/23 and 4/27/96) (available from the author). In that case, the court addressed the lender's request to retain certain of its liens even after full debt payment pursuant to the Chapter 11 plan proposed by the lender, where the borrower has previously asserted state court lender liability claims against the lender.*

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[1] Contrary to the respondent's apparent heartburn manifested in its repeated statements, purporting the petition did not include a basis under Rule 10 for the grant of certiorari, the split between the circuits, the statutes and the state supreme courts were all reported by the respondent, together with the *public policy* issues presented by the petitioner, certainly warrant this Court's intervention—as a favorable outcome would indeed reverse a very serious public detriment concocted by the respondent nearly ten years ago.

> *Under the terms of the lender's plan, the borrower would repay all outstanding principal, interest, costs and expenses currently due to the lender, as the borrower had refused to execute a release of its claims against the lender, the lender would retain its liens in order to secure payment of any costs that the lender would later incur defending the borrower's lender liability claims following confirmation. The borrower, of course, objected. In confirming the plan, the court held that, under the terms of the relevant loan documents, the lender's claim included the lender's future*[2] *contingent costs in connection with the debtor's state court claims against the lender. As a result, in order for the plan to be fair and equitable, the lender was entitled to retain liens on the debtor's property to secure those contingent claims in an amount sufficient to cover such contingent costs (which were estimated at $500,000).*" [Emphasis added] [Pet. App. 14a]

3. The record below confirms that the lender (the respondent) advanced this novel theory of *** *Refusing to Release its Liens Even After Repayment* *** well before the petitioner filed for bankruptcy protection in late 1995. The record below also demonstrates that the lender (the respondent) informed the petitioner in the summer of 1995 (months before the petitioned sought bankruptcy protection[3])

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[2] The actual record below, however, does not support any obligation on the part of the borrower to pay the lender any costs incurred well after the loan was repaid. The operative language, in fact, is as follows: *"Expenses of Collection. Each Guarantor shall pay to Lender on demand any and all expenses paid or incurred by Lender, including reasonable attorney's fees and disbursements, in connection with the collection or enforcement of the Obligations or this Guaranty.* As this Court will note, there was no mention of any future contingency after the loan is deemed "collected". [Supp. App. 5a]

[3] Protection that was not due to insolvency but, rather, to stave off the over-aggressive lending practices demonstrated by the respondent. The

of its unwillingness to discharge its liens on the petitioner's property, even after full repayment of the debt at issue, including the principal, the interest, and all of the lender's costs as of the actual date of repayment.

Contrary to the state appeals court's decision cited by the respondent in page-5 of its Brief in Opposition, which purports that Bishay did not actually tender[4] the $1.5 million balance owed in 1995, the record below in fact confirms that on September 21, 1995, Bishay provided the respondent with a commitment letter reflecting $1.5-$3.0 million available to Bishay, which required the respondent to release its liens on Bishay's property to enable Bishay to close that transaction and deliver approximately $1.5 million to the respondent. On November 1, 1995, Bishay delivered a backup commitment letter also requiring the respondent to confirm its willingness to release its liens on Bishay's property. Furthermore, on November 6, 1995, Bishay delivered yet another commitment letter also requiring the respondent to release its liens on Bishay's property. And, on November 9, 1995, Bishay's counsel wrote to the respondent and requested written assurances that it would in fact release its liens on Bishay's property upon receiving 100% of the loan balance. [Supp. App. 7a - 12a]

By a letter dated November 14, 1995, however, the respondent confirmed, in writing, its earlier oral responses, and unequivocally advised Bishay's counsel of its unwillingness

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record below actually confirms that the petitioned paid 100% to all of his creditors with no discounts, including Citizens.

[4] It was the respondent that advanced this last minute, desperate defense, where it suggested that Bishay should have brought a bag of cash ($1.5 million in cash) to see if the respondent was in fact serious about its stated refusal to discharge its liens. Obviously, this was very strained argument since a borrower customarily refinances or sells his/her property in order to repay the related debt. Erroneously, however, the state appeals court bought into the respondent's disingenuous argument.

to discharge its liens even after full repayment unless Bishay committed not to sue the respondent in the future. The respondent stated as follows:

> *"Thank you for your letter of November 9, 1995. As we have discussed, Citizens would be pleased to deliver a discharge of all mortgages, collateral documents, guaranties, and the like upon full and indefeasible payment of the entire amount of the indebtedness owed to Citizens by Mr. Bishay. Of course, to discharge those liens, Citizens will have to have reasonable assurances that all of that indebtedness has been indefeasibly paid in full, and that further secured indebtedness will not arise. At this point, given Mr. Bishay's stated intention to bring litigation against Citizens relating to Citizens' administration of these loans, and on the assumption that Citizens will incur significant expenses to defend that litigations, Citizens would not have reasonable assurances that the entire indebtedness of Mr. Bishay to Citizens has been indefeasibly paid in full unless that litigation has been resolved or Mr. Bishay commits not to bring that litigation and commits, in appropriate legal documents to do nothing else that would require Citizens to expend legal fees or other costs in connection with this relationship. If you continue to have any questions on this point, please call me".* [Emphasis added] [Supp. App. 13a]

4. As explained in more detail in the petition, Citizens demanded a *general release*, in addition to full repayment of the loan, to which it was not entitled, contractually, legally or equitably. The right to file a complaint against someone is a *constitutional right* and requires neither the placement of money in escrow; nor the maintaining of a lien on the ex-borrower's property, indefinitely—as the respondent alleged in its November 14, 1995 response, which has now become the law of the case. *Id.*

5. While it is clear that the respondent appears to be willing to do anything to keep intact the law it managed to conjure-up to date—for its benefit and the benefit of multitudes of similar secured lenders—for the most part, the statements made in the respondent's Brief in Opposition are simply misleading and not supported by the record below. In the interest of judicial economy, however, the petitioner will only address a few of these inaccuracies herein.

Resp. Opp. 6[5]:

> *"The rights and obligations between the parties were governed by Massachusetts law. The only interplay with federal law concerned the effect to be given a bankruptcy order (i.e. the Plan of Reorganization) in connection with claims emanating from that private banking relationship."* [Emphasis added]

The respondent here attempts to lead this Court to believe that it: (a) was a "private" banking institution; and (b) was not subject to federal jurisdiction.

The problem here is that the record below clearly confirms that the respondent was (and on information and belief continues to be) a "*federally regulated*" banking institution, subject to all federal rules. *See* Supplemental Appendix[6] 14a, which was Exhibit-18 of the deposition taken of the respondent's Chairman and Chief Executive Officer in 1998, Mr. Lawrence K. Fish. [Supp. App. 15a - 17a]. As this Court will note, Mr. Fish indeed executed the *Consolidated Reports of Condition and Income for A Bank With Domestic Offices Only and Total Assets of $300 Million or More—FFIEC 032—Report at the close of business September 30, 1997*, which was submitted to the following government agencies:

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[5] This Reply will reference the pages within the Respondent's Brief in Opposition as (Res. Opp. __).

[6] This Reply includes a Supplemental Appendix, which will cite the pages as follows: [Supp. App. ___]

(1) *Board of Governors of the Federal Reserve System OMB Number: 7100-0036*; (2) *Federal Deposit Insurance Corporation OMB Number: 3064-0052*; and (3) *Office of the Comptroller of the Currency OMB Number: 1557-0081*. When the respondent's counsel submitted his Brief in Opposition on May 24, 2007 to this Court, he and his client were presumed to know that their statements were disingenuous, at best.

6. The respondent now appears confused between the claims asserted in the state court in 1995, as amended in 1996, and the single, separate and distinct, "*$500,000 breach of contract*" claim asserted in the US District Court in 2005. This new breach of contract claim alleged that in 1999 (four years after the filing of the state court claim), Citizens abrogated its $500,000 agreement with Bishay, which was reflected in the confirmed reorganization plan and required Citizens to allow Bishay to freely persecute his claims once he put up the $500,000 in escrow. As the record below confirms, the claims asserted in the state court in 1995 and 1996 alleged that Citizens: (a) violated the covenant of good faith and fair dealing; (b) breached its contractual obligations[7]; (c) its misconduct constituted an unfair trade practice in violation of Mass. G.L., ch. 93A—warranting the award of multiple damages; (d) its conduct threatened Bishay with irreparable harm; (e) failed to act in a commercially reasonable manner; (f) deliberately tampered with real estate appraisals for its own financial gain; (g) concealed from Bishay and the Bankruptcy Court *two-tiered* fee agreements with its attorneys—in an attempt to enrich itself and its

[7] To avoid the potential for confusion, the petitioner respectfully points out that these were separate contractual obligations dealing with the terms of actual loan agreement and not the $500,000 agreement reflected in the confirmed plan of reorganization, which was the new cause of action asserted in the US District Court in 2005, and the subject of the appeal filed with the First Circuit.

attorneys; (h) filed false affidavits with the State and Bankruptcy Courts; (i) deliberately inflicted personal and financial distress on Bishay and his family; and (j) refused to accept full re-payment and refused to discharge its liens—which eventually forced Bishay to seek bankruptcy protection—and there was born the *new breach of contract* claim now at issue.

7. The respondent also appears to be confused between the petition filed with this Court in April 2003 and the pending petition filed in April, 2007. As this Court's records will confirm, the earlier petition was filed two years before Bishay asserted his new breach of contract claim in the US District Court in 2005. Furthermore, the petition filed with this Court in 2003 only dealt with a "reservation" clause within a confirmed plan of reorganization. As reflected in the Respondent's Appendix at 2a, the question presented in 2003 was *whether, notwithstanding 11 U.S.C. 1123(b)(3), a bankruptcy confirmation extinguishes a debtor's claims against a creditor despite the facts that (a) the plan of reorganization expressly *** preserves the debtor's right to pursue all claims he may have against that creditor, and (b) the creditor is indisputably aware that the claims have been preserved.* [Emphasis added]

8. As clearly articulated in the present petition, however, the primary question presented is whether *a Secured Lender May Refuse to Release Its Liens After Repayment;* and the secondary question is whether the District Court and the First Circuit erred when they did not recognize the confirmed plan as a "*contract*" between Bishay and Citizens?

Unable to muster a credible answer to the conflict the respondent itself reported, the respondent resorted to what appears to be hyper-technical reasons why this Court should not grant certiorari. Reasons that have nothing whatsoever to do with the merits of the serious questions pending before this Court now. There is accordingly no merit to the respondent's

contention that this case does not present the important, entrenched conflict among the circuits, the various statutes and state supreme courts, as to whether a lender can lawfully refuse to discharge its liens upon receiving full repayment of the respective debt?

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

Respectfully submitted,

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